

Message Text

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PAGE 01 OSAKA 01217 300925Z

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FM AMCONSUL OSAKA KOBE
TO SECSTATE WASHDC 3257
INFO AMEMBASSY TOKYO

UNCLAS OSAKA KOBE 1217

TOKYO FOR GAIDUK AND JACKSON

E.O. 11652: N/A
TAGS: CGEN, JA
SUBJ: DEPOSITIONS

REF: 8 FAM 841, U.S.-JAPAN CONSULAR CONVENTION

1. POST HAS RECENTLY RECEIVED A NUMBER OF REQUESTS FROM AMERICAN LAWYERS FOR DEPOSITIONS TO BE TAKEN ON NOTICE IN THIS CONSULAR DISTRICT. IT IS NOT CLEAR TO US WHETHER U.S.-JAPAN CONSULAR CONVENTION SPECIFICALLY PROVIDES FOR THIS TYPE OF DEPOSITION UNDER ARTICLE 17, OR RESIDUALLY PROVIDES FOR THEM UNDER ARTICLE 26(1), WE ASSUME THAT OTHERWISE POST UNDER CONVENTION IS NOT AUTHORIZED TO PERFORM THIS SERVICE. CLARIFICATION WOULD BE APPRECIATED.

2. ARTICLE 17 OF CONVENTION READS IN PART(IN THE ENGLISH TEXT) "A CONSULAR OFFICER MAY WITHIN HIS CONSULAR DISTRICT--(E)(11) TAKE DEPOSITIONS, ON BEHALF OF THE COURTS OR OTHER JUDICIAL TRIBUNALS OR AUTHORITIES OF THE SENDING STATE, VOLUNTARILY GIVEN--IN ACCORDANCE WITH THE LAWS OF THE SENDING STATE AND IN A MANNER NOT INCONSISTENT WITH THE LAWS OF THE RECEIVING STATE". THE JAPANESE TEXT COMPRESSES THE AGENCIES ON WHOSE BEHALF DEPOSITIONS MAY BE TAKEN TO "COURTS OR OTHER JUDICIAL AUTHORITIES".

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3. JAPANESE CODE OF CIVIL PROCEDURE, FROM OUR LAY VIEW, APPEARS TO PROVIDE FOR TAKING TESTIMONY, OUTSIDE THE COURT HEARING THE CASE, ONLY ON BASIS OF COURT AUTHORIZATION (IF IN JAPAN, TO ANOTHER COURT, IF ABROAD, TO JAPANESE DIPLOMATIC OR CONSULAR OFFICIAL).

4. APPEARS STRICT INTERPRETATION OF "ON BEHALF OF THE COURTS OR OTHER JUDICIAL AUTHORITIES" MIGHT EXCLUDE DEPOSING WITNESSES IN JAPAN ON THE BASIS OF QUESTIONS SUBMITTED DIRECTLY FROM LEGAL COUNSEL WITHOUT SOME FORM OF ENDORSEMENT BY A COURT. IF SUCH DEPOSITIONS ON NOTICE CAN BE CONSIDERED AS TAKEN "ON BEHALF OF" A COURT, E.G. IF OPPOSING ATTORNEYS CAN FOR THIS PURPOSE BE CONSIDERED AGENTS OF THE COURT, RESULT MIGHT BE CONSIDERABLE SAVING OF TIME AND EFFORT BY AVOIDING NECESSITY OF RETURNING INTERROGATORIES FOR OBTENTION OF COMMISSION TO TAKE TESTIMONY OR OTHER JUDICIAL ENDORSEMENT.

5. WOULD APPRECIATE BEING INFORMED OF DEPARTMENT'S INTERPRETATION OF THIS POINT, AND WHETHER L AND /OR SCA MAY HAVE NEGOTIATING HISTORY CONCERNING CONSULAR CONVENTION WHICH WOULD THROW LIGHT ON SUBJECT.

6. AS REGARDS APPLICABILITY OF "ACT TO WHICH NO OBJECTION IS TAKEN BY THE RECEIVING STATE" CLAUSE IN ARTICLE 26(1) OF THE CONVENTION, TO BEST OF OUR KNOWLEDGE GOJ HAS NEVER OBJECTED TO TAKING OF DEPOSITIONS ON NOTICE IN JAPAN. WE ARE NOT AT ALL SURE THEY KNOW THAT IT HAS BEEN DONE. TOKYO INFORMS US THAT MFA RECENTLY EXPRESSED CONCERN TO CONSULAR OFFICER AT EMBASSY THAT AMERICAN ATTORNEYS COMING TO JAPAN TO PARTICIPATE IN TAKING OF DEPOSITIONS OBTAIN PROPER BUSINESS VISA BEFORE TRAVELING TO JAPAN. AS DEPARTMENT AWARE, THERE IS A GOOD DEAL OF SENSITIVITY, INSPIRED IN PART BY JAPANESE BAR ASSOCIATION,
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TO AMERICAN ATTORNEYS PRACTICING LAW IN JAPAN.
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